



Consulate of Mexico in Indianapolis

Article 36 of the Vienna Convention on Consular Relations

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I. Background

(History of Consular Relations)

Consular relations have been established between peoples since ancient times.

The roots of the institution of Consuls go back to the second half of the Middle Ages.

In Italy, Spain, and France the merchants used to appoint fellow merchants as **arbitrators in commercial disputes**; these were called *Juges Consuls* or *Consuls Marchand*.

Merchants and “Capitulations”

During and after the Crusades, Italian, Spanish and French merchants settle down in the Eastern countries, taking the institution of consuls with them. Merchants from the same nation electing their own consul.

The competence of these consuls became enlarged through treaties, called ‘Capitulations’, between the home states of the merchants and the Mohammedan monarchs on whose territories these merchants had settle down.

XVII Century

The competence of consuls comprised the whole civil and criminal jurisdiction over, and protection of, the privileges, the life, and the property of their countrymen.

But the position of the consuls in the West decayed in the beginning of the seventeenth century:

1. the influence of the rising permanent legations
2. everywhere foreign merchants were brought under the civil and criminal jurisdiction of the state in which they resided

XVII and XVIII

- This change in their function altered the position of consuls in the Christian States of the West altogether. Their functions shrank into a general supervision of the commerce and navigation of their home states, and into a kind of **protection of the commercial interests of their countrymen**. Consequently, they did not receive much notice in the seventeenth and eighteenth centuries.

The institutionalization: XIX century

- It was not until the nineteenth century that the general development of international commerce, navigation, and shipping again drew the attention of the Governments to the value and importance of the institution of consuls. It was then that it was systematically developed.

Consular Act, 1825

- The position of the consuls, their functions, and their privileges were the subject of provisions, either in commercial treaties or in special consular treaties, and a number of states enacted statutes regarding the duties of their consuls abroad, such as the Consular Act passed by Great Britain in 1825.

Vienna, April 24, 1963

- But it was not until the 1960's when there was a movement towards the codification of the customary law and rules on consular practice, into the Convention on Consular Relations, which was done at Vienna on April 24, 1963, and came into force on March 19, 1967.

Inspiring ideas

The drafting of the Vienna Convention on Consular Relations took into account that:

- Consular Relations are based on the Purposes and Principles of the United Nations Charter: (the sovereign equality of States, the maintenance of international peace and security, and, the promotion of friendly relations among nations).
- That the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961.

Inspiring ideas

- The belief that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
- The realization that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States, and
- The affirmation that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the Convention.

Providing rules

- The VCCR **defines the meaning of all the terms** that are used in body of the convention: Consular post, Consular District, Head of consular post, Consular officer, Consular employee, Member of the service staff, Members of the Consular Post, Members of the Consular Staff, Members of the Private Staff, Consular Premises, Consular Archives, Consular Officers: Career Consular officer and Honorary Consular Officer.
- Provides the rules for:
 1. The **Establishment of Consular Relations**
 2. The **Exercise of Consular Functions**

The Consular Functions:

- Protecting the interests of the sending state and of its nationals
- Furthering the development of commercial, economic, cultural and scientific relations
- Promoting friendly relations
- Ascertaining by all lawful means conditions and development in the commercial, economic, cultural and scientific life of the receiving state, and reporting to the sending state
- Issuing passports and travel documents to national of the sending state and visas or appropriate documents to persons wishing to travel to the sending state
- Helping and assisting nationals of the sending state
- Acting as notary and civil registrar and performing certain functions of an administrative nature

The Consular Functions

- Safeguarding the interests of nationals in cases of succession mortis causa in the territory of the receiving state, particularly where guardianship or trusteeship is required
- Safeguarding the interests of minors and other persons lacking full capacity and are nationals of the sending state
- Representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities for the preservation of rights and interests of those nationals
- Transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state
- Exercising rights of supervision and inspection in respect of vessels having the nationality of the sending state and of aircraft registered in that state
- Extending assistance to vessels and aircraft and to their crews
- Performing any other functions entrusted to a consular post by the sending state.

The **Exercise of Consular Functions Outside the Consular District**

The **Exercise of Consular Functions in a Third State**

The **Exercise of Consular Functions on Behalf of a Third State**

The **Classes of Heads of Consular Posts**

The **Appointment and Admission of Heads of Consular Posts**

The **Consular Commission or Notification of Appointment**

The **Exequatur**

Precedence between Heads of Consular Posts

Performance of Diplomatic Acts by Consular Officers

**Appointment of the Same Person by two or more States as
Consular Officer**

Appointment of Member of Consular Staff

Size of Consular Staff

Precedence as between Consular Officers of a Consular Post

Nationality of Consular Officers

Persons Declared “Non Grata”

**Notification to the Receiving State of Appointments, Arrivals
and Departures**

**Termination of the Functions of a Member of a Consular
Post**

Departure from the Territory of the Receiving State

**Protection of Consular Premises and Archives of the
Sending State**

FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO A CONSULAR POST:

- **Facilities**
- **Use of National Flag and Coat of Arms**
- **Accommodation**
- **Inviolability of the Consular Premises**
- **Exception of Taxation of Consular Premises**
- **Inviolability of the Consular Archives and Documents**
- **Freedom of Movement**
- **Freedom of Communication**
- **Art. 36/ COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE**
- **Information in cases of Deaths, Guardianship or Trusteeship, Wrecks and Air Accidents**
- **Communication with the Authorities of the Receiving State**
- **Consular Fees and Charges**

PRIVILEGES AND IMMUNITIES:

- **Protection of Consular Officers**
- **Personal Inviolability of Consular Officers**
- **Notification of Arrest, Detention or prosecution**
- **Immunity from Jurisdiction**
- **Liability to Give Evidence**
- **Waiver of Privileges and Immunities**
- **Exemption from Registration of Aliens and Residents**
- **Exemption from Work Permits**
- **Social Security Exemption**
- **Exemption from Taxation**

- **Exemption from Customs Duties and Inspection**
- **Estate of a Member of the Consular Post or of a Member of His Family**
- **Exemption from Personal Services and Contributions**
- **Beginning and End of Consular Privileges and Immunities**
- **Obligation of Third Countries**
- **Respect for the Laws and Regulations of the Receiving State**
- **Insurance against Third Party Risks**
- **Special provisions Concerning Private Gainful Occupation**

Protocol to the VCCR

OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES. DONE AT VIENNA, ON 24 APRIL 1963

The State parties to “the Convention” expressed their wish to resort, in all matters concerning disputes arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon, within a reasonable period.

THE OPTIONAL PROTOCOL

- **THE UNITED STATES PROPOSED THE PROTOCOL IN 1963 AND RATIFIED IT IN 1969.**
- **IT WAS ALSO THE FIRST COUNTRY TO INVOKE THE PROTOCOL BEFORE THE INTERNATIONAL COURT OF JUSTICE IN 1979 TO PROTECT ITS CITIZENS ABROAD:**

**USA vs IRAN: 52 U.S. HOSTAGES
IN TEHRAN**

Article 36. -

- **COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE**
- **1.- With view to facilitating the exercise of consular functions relating to nationals of the sending State:**
 - a) **consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;**

Article 36. -

- b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;**

- c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuant of judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.**

Article 36. -

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.



the U.S. Department of State

In regards to Consular Notification and Access, the U.S. Department of State provides detailed instructions so that all levels of law enforcement ensure that foreign governments can extend appropriate consular services to their nationals in the United States and that the United States complies with its legal obligations to such governments.

Case concerning Avena and other Mexican Nationals **(Mexico vs. United States of America)**

- **On January 9 2003, Mexico instituted proceedings against the United States for “violations of the Vienna Convention on Consular Relations”, allegedly committed by the United States.**
- **Mexico based the jurisdiction of the Court on Article 36, paragraph 1, and on the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention.**
- **On the same day Mexico also filed a request for the indication of provisional measures.**

Order of February 5, 2003, the Court indicated the following provisional measures:

- **(a) “The United States of America shall take all measures necessary to ensure that Mr. Cesar Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;**
- **(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.”**
- **The U. S. informed the relevant state authorities of Mexico’s application, and obtaining information about the fifty-four (54) cases of capital punishment.**

At the oral proceedings Mexico argued that:

That the United States of America, in arresting, detaining, trying, convicting and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection to its own nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention;

At the oral proceedings Mexico argued that:

- **That the obligation in Article 36 (1) requires notification of consular rights and reasonable opportunity for consular access before the competent authorities of the receiving State take any action potentially detrimental to the foreign national's rights;**
- **That the U. S. violated its obligations under Article 36 (2) of the VCCR by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36**

- That pursuant to the injuries suffered by Mexico,...it is entitled to full reparation ...in the form of restitutio in integrum;
- That this restitution consists of the obligation to restore the statu quo ante by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals;
- That this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings;

- **That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals;**
- **That the United States of America shall cease its violations of Article 36 of the VCCR ... and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and 36 (2).**

The U.S. objections:

The U.S. objected to jurisdiction and admissibility:

- The Mexican Memorial is addressed to the treatment of Mexican nationals in the federal and state criminal justice systems of the U.S.
- Abuse of jurisdiction? But the jurisdiction of the Court has been invoked under the VCCR and Optional Protocol.

The U.S. objections:

- Objections about the nationality of the individuals concerned:
- The Court finds that it is for Mexico to show that the 52 persons listed held Mexican nationality
- And for U.S. to demonstrate that persons of Mexican nationality were also United States nationals

However the Court found:

- **by fourteen votes to one, that by not informing, without delay upon their detention, the Mexican nationals above their rights under Article 36, 1(b), of the VCCR, the United States of America breached the obligations incumbent upon it;**

However the Court found:

- **by fourteen votes to one, that, by not notifying the appropriate Mexican consular post without delay of the detention of Mexican nationals, and thereby depriving Mexico of the right, in a timely fashion, to render the assistance provided for the Vienna Convention to the individuals concerned, and to communicate with and have access to those nationals and to visit them in detention, the United States breached the obligations incumbent upon it under article 36, of the Convention.**

However the Court found:

- **by fourteen votes to one that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals ... by taking into account both the violation of the rights set forth in Article 36 of the VCCR;**

However the Court found:

- **unanimously takes note of the commitment undertaken by the United States to ensure implementation of specific measures adopted in performance of its obligations under Article 36**





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